(8)

No. 04-368

IN THE

# Supreme Court of the United States

ARTHUR ANDERSEN LLP,

*Petitioner*,

*v.*

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## BRIEF OF *AMICUS CURIAE* AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF PETITIONER


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## INTERESTS OF AMICUS CURIAE

The American Institute of Certified Public Accountants ("AICPA" or "Institute") is the national organization of the certified public accounting profession, all of whose more than 340,000 members are certified public accountants ("CPAs"). The AICPA's service to the public spans more than one hundred years and extends to certified public accountants in academia, government and business as well as those who provide accounting services through firms of all sizes, and as solo practitioners.

Among the AICPA's purposes are the promotion and maintenance of high professional standards of practice. In pursuit of these ends, the AICPA has been a principal force in developing accounting and auditing standards, drafting model legislation, sponsoring educational programs, and issuing professional publications to improve the quality of services provided by CPAs to their clients and the public. As part of the Institute's role in providing guidance and leadership on issues relevant to the profession, the Institute frequently files *amicus* briefs in connection with matters that impact the scope and bases of liability sought to be imposed upon its CPA members. The AICPA has appeared previously as *amicus curiae* before this Court on a variety of such issues.[1]

It is because of its commitment to the public interest and the profession that the Institute believes that, among other things, this Court should provide appropriate clarification

1. Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, *amicus* state that no counsel for a party authored any part of this brief, and no person or entity other than *amicus* and their counsel made a monetary contribution to the preparation or submission of this brief.

of the term "corruptly persuades" as contained in federal criminal statutes such as that at issue here. As discussed below, businesses of all types and sizes, but particularly those in the learned professions, will be forced to act at their peril in making what had been routine business decisions, such as those related to document retention policies. At a minimum, the Fifth Circuit's decision violated the rule of lenity. Failure to apply this rule to an ambiguous criminal statute can have dramatic and unintended consequences that harm businesses, the profession and, ultimately, the public.

## INTRODUCTION AND SUMMARY OF ARGUMENT

In the case below, Arthur Andersen & Co. ("Andersen") was convicted by a federal jury sitting in Southern District of Texas of "witness tampering" in violation of 18 U.S.C. § 1512(b). The government charged Andersen based on instructions given by senior Andersen officials, including an in-house Andersen lawyer, to members of their audit engagement team working on the Enron audit to comply with Andersen's document retention policy. This instruction occurred prior to Andersen's receipt of a subpoena from the Securities and Exchange Commission ("SEC").

At trial, the government requested, and the court gave to the jury, an instruction that the term "corruptly persuades" contained in 18 U.S.C. § 1512(b) means persuasion motivated by an "improper purpose" to "subvert, undermine, or impede the fact-finding ability of an official proceeding" even if "Andersen *honestly and sincerely believed that its conduct was lawful*." (Brief of Arthur Andersen at 3 (citing to Appendix filed with the Petition for Certification at 48a, 49a) (emphasis added).) On appeal, the Fifth Circuit affirmed the conviction, finding that this aspect of the jury instruction



was proper. *United States v. Arthur Andersen LLP*, 374 F.3d 281 (5th Cir. 2004).

There is an acknowledged conflict among the Courts of Appeals regarding the meaning of "corruptly persuades" under Section 1512(b). Some circuits, including the Fifth Circuit, have held that it requires nothing more than persuasion with an improper purpose. We submit, however, that the better reasoned decisions, including those from the D.C. Circuit and Third Circuit, have stated that equating "corrupt" persuasion with persuasion merely for an improper purpose is impermissibly vague and renders the "corruption" element superfluous.

Additionally, the court below improperly instructed the jury concerning another important element of Section 1512(b)—namely, what constitutes an "official proceeding." While the statute states that a proceeding "need not be pending or about to be instituted at the time of the offense," the jury instruction provided a gloss on the statute that essentially broadened "official proceeding" to encompass any aspect of an agency's "fact-finding," whether there is an "official proceeding" at all, or even an expectation of one. Yet there is no support in the statute's language, legislative history or otherwise for this interpretation. And in fact this interpretation is contrary to this Court's prior authority on analogous statutes.

At a minimum, application of the rule of lenity required that the court below interpret this vague criminal statute narrowly so that those subject to the statute can have adequate and clear notice as to what will constitute illegal conduct under the statute. The failure to apply lenity under such circumstances can result in tragic, unintended consequences,

such as the complete dismantling of a national accounting firm like occurred here.

Criminal statutes affecting the accounting profession are multiplying. It is important that these statutes are interpreted in a fair and careful manner. This is particularly the case when the statutes may touch upon the kinds of instructions and business decisions that accounting firms and others in the profession grapple with daily. Dealing with these issues is always difficult; the additional ambiguity now imbued into these decisions by the Fifth Circuit's holding, however, creates even more fear, burden and distraction in an environment where risk-management concerns are already detrimentally affecting the accounting profession, and, ultimately, the public.

For these reasons, and those addressed in more detail below, we urge the Court to reverse the decision of the Fifth Circuit Court of Appeals below.

## ARGUMENT

### I. The Jury Instruction Upheld By The Fifth Circuit Was Based On Erroneous Interpretation Of Section 1512.

#### A. The Fifth Circuit Improperly Interpreted "Corruptly Persuades" as Used in Section 1512(b).

The statute at issue here is 18 U.S.C. § 1512(b). Section 1512(b) stated at the time that

> [w]hoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . cause or induce any person to . . . alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than ten years, or both.



It is the Fifth Circuit's instruction of the meaning of "corruptly persuades" that is at the heart of this appeal.

Specifically, the jury was instructed that the phrase "corruptly persuade" meant an improper purpose to induce another person to engage in certain conduct. "An improper purpose, *for this case*, is an intent to subvert, undermine, or impede the fact-finding ability of an official proceeding." *United States v. Arthur Andersen LLP*, 374 F.3d 281, 293 (5th Cir 2004) (emphasis in original). Andersen requested, but the court declined to include in the charge, an instruction that corrupt persuasion be found only where there was use of an improper method or violation of an independent legal duty. Conversely, the government requested, and the court included in the charge, the instruction that Andersen could be found guilty even if "Andersen honestly and sincerely believed that its conduct was lawful." (Arthur Andersen Brief at 3.)

Courts have recognized that in the context of Section 1512(b), as well as that of the other federal obstruction of justice statutes, "corruptly" can be given either a transitive or intransitive meaning. *See, e.g., United States v. Poindexter*, 951 F.2d 369, 378 (D.C. Cir. 1991). Under the transitive definition, "corruptly" requires persuasion by means of corruption or bribery, while under the intransitive definition, "corruptly" only requires that the person act corruptly or in

a corrupt or depraved manner. *Id.* at 379 (citing to 3 Oxford English Dictionary 974 (2d ed. 1989)). Andersen requested that "corruptly" be given the transitive meaning so as to require a finding that the persuader had actually utilized improper means to persuade. The government urged, and the court chose, however, the intransitive meaning, requiring only that the person act corruptly, in this case defined as "for an improper purpose."

We submit that the better-reasoned decisions have properly found "corrupt persuasion" to require more than "an improper purpose." In *United States v. Farrell*, 126 F.3d 484 (3d Cir. 1997), for example, Farrell was convicted of attempting to corruptly persuade a witness to withhold testimony from a Department of Agriculture agent. The court held that "[w]ithout any definitional assistance, we find the phrase 'corruptly persuades' to be ambiguous," and agreed that it could not simply mean an intent to hinder communication with law enforcement, because such an interpretation would render "corruptly persuades" in the statute superfluous. *Id.* at 487. The court specifically rejected using 18 U.S.C.§ 1503[2] as a basis for interpreting corrupt persuasion in Section 1512 because the two statutes were not sufficiently analogous. *Id.* at 490. The court correctly recognized that "corruptly" in the context of Section 1503 can reasonably be defined as for an improper purpose because such a definition provides the *mens rea* element of Section 1503. *Id.* at 490. Section 1512, however, in contrast, already contains a *mens rea* requirement, since the statute requires "knowing" conduct. Thus, the court found that applying the

2. "Whoever corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished." 18 U.S.C. § 1503 (West 2004).



"improper purpose" definition from Section 1503 to Section 1512 renders corruptly persuades in Section 1512 superfluous.

The court in *United States v. Davis*, 183 F.3d 231, 250 n.6 (3d Cir. 1999), agreed with this approach, and found in its review of a jury instruction — similar to the one at issue here — that equating "corruptly persuades" with an improper purpose was insufficient, and required clarification on remand. The court cited its approval of *Poindexter*, and agreed that the core of Section 1512(b)'s prohibition of corrupt persuasion was directed at a person who, for "purpose of influencing an inquiry, influences another person (through bribery or otherwise) to violate a legal duty." *Id.* at 249 (quoting *Poindexter*, 951 F.2d at 385). Again, the court correctly recognized that the transitive meaning of "corruptly" was the most appropriate definition, as the intransitive meaning provides insufficient guidance as to what conduct will be considered criminal.[3]

Assigning a transitive meaning, moreover, comports with the indisputable purpose of the statute. Section 1512 is a "witness tampering statute," typically used to punish obviously illegal and morally reprehensible conduct such as killing, attempting to kill, or harming a witness, or using other clearly improper forms of violent and coercive intimidation, like bribery. *See* S. Rep. No. 97-532, at 3 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2515, 2521 (1982); *see also* 134 Cong.

3. Another factor in favor of a transitive definition of "corruptly" is the fact that the other terms contained in Section 1512(b) are transitive as well. As discussed in more detail in petitioner's brief, "use intimidation," or "threatens" both go to the defendant's conduct and not to the purpose of the conduct. Therefore, the principal of *ejusdem generic* requires a transitive interpretation.

Rec. S17,360-02 (daily ed. Nov. 10, 1988) (noting that amendment of Section 1512 to include "corruptly persuades" was intended to address bribing a witness to give false testimony). In sum, the proper interpretation of "corruptly persuades" requires an improper means of persuasion, inducement to perform an illegal act, or at least consciousness of wrongdoing in attempting to influence a witness.

The jury instruction concerning "corruptly persuades" was also erroneous in essentially extending Section 1512(b) to cover any "intent to impede the fact finding ability of an official proceeding." *Anderson*, 374 F.3d at 295. Not only does such language exist *nowhere* in the statute itself, but is contrary to a fundamental tenet of this country's legal system. As discussed in petitioner's brief, and in this brief *infra*, practically any decision made by a subject of a governmental proceeding can have the effect (in the government's view, at least) of "impeding" that proceeding, and is therefore criminalized by the Fifth Circuit's instruction. Yet the adversarial nature of our legal system not only permits such conduct but encourages it. Consider, for example, protections provided by the First Amendment and the Fifth Amendment, which, respectively, allow one to speak against the government, or to not speak at all. Yet both actions arguably "impede" fact-finding of a governmental agency.

Indeed, lawyers are required to provide zealous representation of their clients. There are, no doubt, limitations on such representation in connection with governmental proceedings—hence, the presence obstruction of justice statutes. But, importantly, these statutes, as well as decisions interpreting them, have recognized this tension, and have therefore sought explicitly to strike the proper balance. Thus,



for example, 18 U.S.C. § 1505[4] requires that a proceeding be pending. And case law interpreting 18 U.S.C. § 1505 has defined "corruptly" to require an act done to bring about an unlawful result, or a lawful result by some method that the defendant knew or thought was unlawful. *See, e.g., United States v. North*, 910 F.2d 843, 942-43 (D.C. Cir. 1990) (Siberman, J., concurring in part and dissenting in part).

Courts in the Second and Eleventh circuits, as well as the Fifth Circuit in the case below, in contrast, have ignored these concerns, and instead have interpreted "corruptly persuades" far more broadly, despite a recognition that the language at issue was not without ambiguity. In *United States v. Thompson*, 76 F.3d 442 (2d Cir. 1996), the court relied almost exclusively on cases interpreting Section 1503 to find Section 1512(b) "not impermissibly vague" when defining corrupt persuasion to mean motivated by an improper purpose. *Id.* at 452. The Eleventh Circuit, in *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998), following *Thompson*, declined to extend the rationale of *Poindexter* to Section 1512 because it viewed Section 1505 as not sufficiently similar to Section 1512. *Id.* at 1300. While the court believed that "corruptly persuades" is defined analogously in Section 1503, in fact the court failed to recognize the differences between these two sections. *Id.* As previously discussed, that "corruptly" in the context of Section 1503 may be clearly and properly defined to mean for an improper purpose is of no direct consequence in interpreting Section 1512(b), as Section 1512(b) contains a specific *mens rea* requirement whereas Section 1503 does not.

4. "Whoever corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States . . . shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 1505 (West 2004).

In evaluating Andersen's objection to the jury instruction, the Fifth Circuit rejected Andersen's argument that defining "corruptly persuades" to mean an improper purpose renders the term superfluous. More particularly, the Fifth Circuit found that defining "corruptly persuades" to mean an "intent to subvert, undermine, or impede the fact-finding ability of an official proceeding" was not duplicative of the statute's subsequent reference to the "intent to impair the object's integrity or availability for use in an official proceeding," because the intent to impair the availability of documents for an official proceeding makes no reference to the "fact-finding" ability of the official proceeding. The Fifth Circuit also consulted the legislative history of Section 1512(b) both as it was officially enacted, and then subsequently amended in 1988 to include the corrupt persuasion element, and found that "defining 'corruptly' as 'motivated by an improper purpose' comports easily with the legislative history." *Anderson*, 374 F.3d at 296.

To the contrary, however, as discussed above, use of the *intransitive* meaning of "corruptly" in the context of Section 1512(b) renders the term "corruptly persuades" superfluous. If "corruptly persuades" is defined, as suggested by the Fifth Circuit, to "impede the fact-finding ability of an official proceeding," there would be no need for the additional language present in the statute, which already prohibits a person from inducing another to make a document unavailable in an official proceeding. If making a document unavailable in an official proceeding is not impeding the fact-finding ability of the official proceeding, then what effect does making the document unavailable have? In short, as the more well-reasoned decisions acknowledge, such an interpretation of corrupt persuasion is circular. As the court below even noted, this interpretation casts only a "dim light"



on "corruptly" as contained in Section 1512(b). *Andersen*, 374 F.3d at 294.

In fact, many courts addressing "corruptly persuades" under Section 1512(b) have acknowledged that the language contained in the statute is ambiguous. *See, e.g., Farrell*, 126 F.3d at 487 ("[W]e find the phrase 'corruptly persuades' to be ambiguous."); *Davis*, 183 F.3d at 250 n.6 (finding that a jury instruction equating corrupt persuasion to improper purpose provided "insufficient guidance."); *Poindexter*, 951 F.2d at 378 ("We must acknowledge that, on its face, the word "corruptly" is vague."). Those courts that have not specifically stated that "corruptly persuade[s]" is vague have at least acknowledged that the term may be given more than one meaning." *Shotts*, 145 F.3d at 1300-01 (discussing *Poindexter* and *Farrell*); *United States v. Thompson*, 76 F.3d 442, 452 (2d Cir. 1996) (referring to Section 1503, and addressing that section to interpret Section 1512).

In *United States v. Poindexter*, the court evaluated "corruptly persuades" in the context of Section 1505, which specifically governs obstruction of justice in the context of congressional committee hearings. Looking to both the transitive and intransitive meaning of the term "corruptly," the court found the term unconstitutionally vague under both uses without "some narrowing gloss," the absence of which would require people to guess at its meaning. 951 F.2d at 378. Finding the plain meaning failed to provide sufficient definiteness, the court consulted the legislative history. *Id.* The court stated that statements made by members of the Judiciary Committee in 1982, at the time of the passage of the Victim and Witness Protection Act of 1982, and the addition of Section 1512 strongly suggested that in the context of Sections 1503 and 1505, "'corruption' is

something more specific than simply 'any immoral method used to influence a proceeding.'" *Id.* at 382. The court ultimately concluded that the statute, as applied to the conduct at issue in the case, failed to provide sufficient notice of its criminality as required by the constitution. *Id.* at 386.

Even Congress itself has recognized that the laws in effect at the time of Andersen's conviction were ambiguous; this recognition contributed to the enactment of Sections 802 and 1102 of the Sarbanes-Oxley Act. The Senate Committee Report in connection with the passage of Sarbanes-Oxley specifically stated that "the current laws regarding destruction of evidence are full of ambiguities and limitations that must be corrected." S. Rep. No. 107-146, at 7 (2002).

The changes made to Section 1512 particularly, and the witness tampering statutes more generally, serve to highlight the ambiguity contained in Section 1512's prohibition against corrupt persuasion. Section 1512 now contains subsection (c), which criminalizes the conduct of the person who actually destroys documents "with the intent to impair" their "availability for use in an official proceeding." 18 U.S.C. § 1512(c) (West 2004). This was in response to recognition by Congress of the absurd result of criminalizing the conduct of the person who directs the document destruction, but failing to do so with respect to the person who actually destroys the documents. S. Rep. No. 107-146, at 7. Congress stated with respect to Anderson specifically that the government had been forced to "proceed under the legal fiction that the defendants are being prosecuted for telling other people to shred documents, not simply for destroying evidence themselves." *Id.* Section 802 of the Sarbanes-Oxley Act also added Section 1519, making it a crime to destroy documents specifically in connection with federal



investigations. 18 U.S.C. § 1519 (West 2004). Referred to as the "new general anti-shredding" provision, 148 Cong. Rec. S7418-19 (daily ed. July 26, 2002), Section 1519 prohibits shredding of documents "in relation to or contemplation of" any matter within the jurisdiction of any department or agency of the United States. 18 U.S.C. § 1519

It is notable that both these new provisions do not use the term "corrupt persuasion." Rather, Section 1512(c) and Section 1519 specify the underlying conduct that is criminal, rather than the direction of such conduct, and thereby remove the "legal fiction." In all events, these amendments underscore the ambiguity of "corruptly persuades" as contained in Section 1512(b), as well as demonstrate the still-present need for clarification as to the term's specific meaning.

### B. The Fifth Circuit's Interpretation of "Official Proceeding" Was Also Erroneous.

The Fifth Circuit's broad view of what constitutes the required nexus to an "official proceeding" in upholding that element of the jury instruction, *Anderson*, 374 F.3d at 284, is also unsupported by the statute, and further, removed an important means of distinguishing between legal and illegal behavior. While Section 1512 does not require that a proceeding be pending or about to be instituted, the district court went well beyond, defining a "proceeding" to include "all of the steps and stages in the agency's performance of its governmental functions, and it extends to administrative as well as investigative functions, both formal and informal." *Id.* at 297 n.32. The district court specifically rejected Andersen's effort to include a requirement that there be some proof that the defendant believed that *some* particular proceeding was likely to occur in the near future.

Without such a touchstone, however, there is a very real risk that perfectly legal conduct will be inadvertently transformed into illegal conduct. This Court recognized the importance of such a touchstone in *United States v. Aguilar*, 515 U.S. 593 (1995). There the Court concluded that without knowledge of a particular pending proceeding, a "defendant lack[s] the evil intent to obstruct." *Id.* at 599. Otherwise, in connection with practically every decision to throw a paper in the trash, one would have to play through every hypothetical scenario of the likelihood, or even mere possibility, of an agency inquiry to which that paper may be relevant — an impossible exercise. As discussed above, this has never been the intention of any obstruction of justice statute, and its practical implications, addressed *infra*, are overwhelming.

### C. The Rule of Lenity Requires a Narrow Interpretation of an Ambiguous Criminal Statute.

The rule of lenity has a long history of use in American jurisprudence. The rule requires that criminal statutes be narrowly construed so as to provide society with fair notice as to what constitutes criminal conduct, and to allow the legislature alone to determine what conduct will be deemed criminal. *See* Sarah Newland, Note, *The Mercy of Scalia: Statutory Construction and the Rule of Lenity*, 29 Harv. C.R.-C.L. L. Rev. 197, 197 (1994). The rule has its foundation in *United States v. Wiltberger*, where the Court stated that "[t]he rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principal, that the power of punishment is vested in the legislature, not in the judicial department." 18 U.S. 76, 95 (1820). Thus, where a criminal statute is unclear as to the conduct that it is meant to cover, the rule of lenity requires



that courts provide a narrow interpretation. "[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher one only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987); *see also United States v. Bass*, 404 U.S. 336, 347 (1971) ("[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.") (citation omitted); *Bell v. United States*, 349 U.S. 81, 83 (1955) ("It may be fairly said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against imposition of a harsher punishment.") The rule of lenity "provides a time-honored interpretive guideline when the congressional purpose is unclear." *Liparota v. United States*, 471 U.S. 419, 427 (1985).

This Court has continued to hold that the rule of lenity is the proper approach to statutory construction of a criminal statute, most recently in *Scheidler v. NOW, Inc.* 537 U.S. 393 (2003). There the Court, citing *McNally*, narrowly construed the Hobbs Act to find that the petitioner in that case had not committed the violation charged. Although Justices of this Court have been divided as to whether the rule of lenity should be applied where there is ambiguity in the wording of the statute, or only where ambiguity still exists after consultation with the legislative history, *United States v. R.L.C.*, 503 U.S. 291 (1992), the rule of lenity should be applied to this case in either instance, as Section 1512(b) is vague and ambiguous both on its face, and after consultation with the legislative history.

At least one court addressing the corrupt persuasion clause of Section 1512(b) has specifically stated that application of the rule of lenity is the proper approach to statutory interpretation in the context of the vagueness

contained in this statute. *See Farrell*, 126 F.3d at 489. In finding that the defendant in that case did not engage in conduct sufficient to rise to the level of corrupt persuasion — defined by the trial court in that case as persuasion with intent to hinder communication to law enforcement — the court stated that such a result was mandated by the rule of lenity. *Id.* ("Even if we did not find this the most reasonable reading, however, we would nevertheless find that it is a permissible one and that the rule of lenity requires its adoption in this case.")

Similarly, the rule of lenity is the proper approach in this case for several reasons. First, Section 1512(b) is clearly ambiguous. As discussed above, on the face of the statute, it is unclear whether Congress intended "corruptly" to be given its transitive or intransitive meaning. Further, it is unclear what types of conduct Congress intended to criminalize by adding "corrupt persuasion" to the list of conduct that encompass witness tampering as defined by Section 1512(b), and the legislative history is not elucidating. 134 Cong. Rec. S17, 360-02. It is simply uncertain whether Congress meant for Section 1512(b) to track the conduct covered by Section 1503, or whether the 1988 amendment to Section 1512(b) was merely meant to correct an inaccurate interpretation of the statute in a particular circuit. *Id.* (suggesting that the amendment was for the purpose of fixing a "gap" identified by the Second Circuit as between Section 1503 and Section 1512). Finally, as also discussed above, there is ambiguity as to the nexus required to an "official proceeding."

When ambiguity like that present here exists, as even the Fifth Circuit at least implicitly acknowledged, application of the rule of lenity is required. This is the only means by which to provide proper notice of the potentially criminal



conduct, and to maintain the legislative branch's discretion to determine the criminality of particular conduct. If not, courts, and in turn juries, are left to guess what conduct Congress intended to criminalize, with the enormous risk of unforeseen and unintended consequences.

## II. The Fifth Circuit's Decision Sets A Dangerous Precedent And May Result In The Criminalization Of Ordinary Business Decisions Affecting Learned Professions.

The ambiguities left by the Fifth Circuit's upholding of the jury instruction have serious policy implications. Failure to define "corruptly persuades" to include a requirement that the purpose be objectively improper, and permitting its extension to all "fact-finding" activities of a governmental agency, creates the possibility that ordinary business and legal decisions will be transformed into potentially criminal conduct.

First, while Section 1512 and other statutes now deal more explicitly with retention of documents in certain specific and obvious circumstances, there are a host of other scenarios that such statutes do not explicitly address. Document retention policies are not, as some appear to imply, inherently evil. Companies, firms and partnerships, and particularly the accounting profession, generate enormous amount of documents and data on a daily basis. There are completely legitimate reasons not to maintain every piece of paper, including the financial costs of retention, as well as those associated with the possibility of litigation. The costs of producing documents and data in connection with litigation

are skyrocketing. Eric Van Buskirk, *Raging Debate: Who Should Pay for Digital Discovery*? N.Y.L.J., Jan. 27, 2003, at Col. 1 (noting that civil discovery is no longer affordable). There is, moreover, a valid concern that drafts and outdated documents will be taken out of context long after the fact. As to the accounting profession specifically, generally accepted auditing standards ("GAAS") have never required auditors to keep every document associated with an audit. GAAS AU § 339. And even the new requirements of the Sarbanes-Oxley Act, the securities laws, and the Public Company Accounting Oversight Board do not require retention of every document or piece of information reviewed or generated in connection with an audit. *See* Gary G. Grindler & Jason A. Jones, *Please Step Away from the Shredder and the "Delete" Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 Am. Crim. L. Rev. (2004) (discussing various document retention requirements.)

Yet for the reasons discussed above, the Fifth Circuit has potentially put at issue the ability to develop and apply ordinary course document retention policies for practically any audit firm. CPAs, and particularly auditors in the practice of public accounting, are routinely faced with clients that have matters involving interactions with regulatory agencies. But if even a good faith and honestly held belief that application of a document retention policy can give rise to illegal conduct, then why would any accountant that has a client with any ongoing interaction with a regulator, even with respect to what may be a completely routine matter, ever recycle its documents in accordance with its ordinary policy?



Second, while there can be no doubt that the accounting issues that have given rise to the enactment of statutes like Sarbanes-Oxley Act are significant, it is an overreaction to cast a potential criminal net around nearly every decision that could have some impact on a governmental investigation. Yet, that is exactly the havoc that the Fifth Circuit has wreaked, through its intransitive definition of "corrupt," its encompassing of all "fact finding" of an agency, and its amorphous perspective on an "official proceeding." There is hardly a firm auditing a public company that will not find itself or its client the subject of a regulatory or similar inquiry at some point. Lawyers and others inside or outside the firm may be consulted regarding matters related to the inquiry, such as determining what to produce in response to document requests, or determining whether, what or when to report to a regulator in connection with such a matter. These are complex and often subjective judgments, requiring, among other things, assessments of the possibility of criminal or civil liability, application of the attorney-client privilege, and even the potential exercise of constitutional rights. (We understand that more specific examples of these types of issues are discussed at length in the briefs of petitioner and other *amici* and, accordingly, they will not be repeated here.)

Criminalizing what is believed to be lawful behavior regarding these types of decisions is not necessary, nor is it desirable. There are already numerous statutes applicable to the accounting and legal professions that explicitly and objectively set forth the boundry between permissible and criminal conduct, including securities fraud statutes, mail, wire and bank fraud statutes, and unambiguous obstruction of justice statutes. There are, in addition, state criminal statutes, and, specifically as to the accounting profession, the AICPA's Code of Professional Conduct, and, as to the legal profession, various codes and rules of professional responsibility. The prospect of criminal liability

under some vague criminal statute that might be given some novel interpretation is simply not a necessary deterrent to illegal conduct.

But more importantly, the vagaries of a decision such as the Fifth Circuit's come at great cost not only to the profession, but ultimately to the public. The accounting profession and its clients are already burdened by a massive increase in litigation and other legal costs. *See* John J. Rapisardi, *Second Circuit Decisions May Increase Accountant/Auditor Liability*, N.Y.L.J., Sept. 21, 2000, at Col. 1 (noting that "litigation costs for accountants continue to grow," especially because "accountants may be viewed as defendants with deep pockets"); Elizabeth MacDonald, *More Accounting Firms Are Dumping Risky Clients*, Wall St. J., Apr. 25, 1997, at A2. Increasing legal and related costs are passed on to the clients in the form of more expensive auditing services. While large clients may find themselves paying increased audit fees reflecting higher prices for malpractice insurance, small clients may not only pay increased fees, but may have trouble finding auditors at all. *See, e.g.*, Lynnley Browning, *Sorry, the Auditor Said, but We Want a Divorce*, N.Y. Times, Feb. 6, 2005; Jeffrey R. Cohen & Dennis M. Hanno, *Auditor's Consideration of Corporate Governance and Management Control Philosophy in Preplanning and Planning Judgments*, Auditing: A J. Prac. & Theory, (Oct. 2000) ("Audit firms increasingly focus on identifying risky clients"). Small clients may be left with a shrinking pool of accountants willing to bear the higher risk—which includes the risk of regulatory matters—associated with audits of small-companies. *See* Lynnley Browning, *Sorry, the Auditor Said, but We Want a Divorce*, N.Y. Times, Feb. 6, 2005; Carl Pacini, Mary J. Martin & Lynda Hamilton, *At the Interface of Law and Accounting*, 37 Am. Bus. L.J. 171, 173 (2000) (noting that increased litigation has caused accounting



firms to be "more aggressive in refusing to render services to high-litigation-risk firms."); Frederick Jones and K. Raghunandan, *Client Risk and Recent Changes in the Market for Audit Services*, 17 J. Acct. & Pub. Policy 169, 171-172 (1998); Elizabeth MacDonald, *More Accounting Firms Are Dumping Risky Clients*, Wall St. J., Apr. 25, 1997, at A2. In sum, the victims of this unnecessarily increased risk ultimately will be shareholders and consumers, who will bear higher auditing costs and reduced auditing services.

Criminal penalties are intended to punish only the most extraordinary conduct — conduct that has been clearly identified as repulsive to societal norms. New criminal statutes applicable to companies and employees, such as the Sarbanes-Oxley Act, are multiplying. At a minimum, courts should be reminded that in the instance of a vague criminal statute, such as that at issue here, it is necessary to apply the rule of lenity. This is the only means by which to ensure the appropriately narrow interpretation of criminal statutes, and that such statutes are applied only to conduct that is genuinely and objectively criminal. Otherwise, the consequences that the profession and, ultimately, the public may suffer will be profound.

## CONCLUSION

This Court should reverse the decision of the Fifth Circuit upholding the jury instruction for all the reasons set forth above.

Respectfully submitted,

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